

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION NO. 03-317-01</b>
	:	
<b>v.</b>	:	<b>CIVIL ACTION NO. 06-1265</b>
	:	
<b>JOSEPH DAVIS</b>	:	

**MEMORANDUM OPINION**

**Savage, J.**

**October 3, 2006**

The defendant, who pled guilty to conspiracy and sixteen robberies, has filed a *pro se* motion under 28 U.S.C. § 2255, alleging that he “received two sentences for the same offense” and his counsel was ineffective for failing to object to the imposition of consecutive sentences. He does not contest the validity of his guilty plea or the plea agreement. Nor does he question the appellate waiver.

In its response to the defendant’s motion and its motion to dismiss the defendant’s motion, the government requests dismissal of the defendant’s motion because he waived his appellate rights, including the right to collaterally attack his sentence, in his plea agreement. It also argues that the defendant’s claims are frivolous.

Because the defendant knowingly and voluntarily waived the right to collaterally attack his sentence, and upholding the waiver will not result in a miscarriage of justice, the defendant’s motion will be denied and the government’s motion will be granted. Even if there were no valid waiver, the defendant’s claims fail on the merits.

**Procedural History**

The defendant was charged in an indictment with one count of conspiracy and 17 counts of Hobbs Act robbery. On November 3, 2003, pursuant to a written plea agreement, the defendant entered a guilty plea to conspiracy and 16 robberies. The plea

agreement included a waiver of appellate rights, including a waiver of his right to pursue a collateral attack through a habeas motion to vacate, set aside or modify his sentence. The defendant limited his right to appeal to three instances: if the government appealed, his sentence exceeded the statutory maximum, or the sentencing judge erroneously departed upward from the sentencing guideline range.

On March 22, 2005, the defendant was sentenced to 175 months imprisonment. He did not appeal to the Third Circuit Court of Appeals. On March 24, 2006, he filed his *pro se* motion under 28 U.S.C. § 2255. He refiled using the standard form on April 24, 2006. The government filed both a response to the motion and a motion to dismiss the defendant's motion.

### **The Appellate Waiver**

Appellate waivers are valid and enforceable if entered knowingly and voluntarily, and enforcing them will not work a miscarriage of justice. *United States v. Khattak*, 273 F.3d 557, 558 (3d Cir. 2001). Appellate waivers cover meritorious and debatable claims. Later changes in the law do not affect the validity of a waiver nor the guilty plea itself. *United States v. Lockett*, 406 F.3d 207, 213 (3d Cir. 2005). A waiver of appeal includes relinquishing “the opportunity to challenge the sentence imposed, regardless of the merits”. *Khattak*, 273 F.3d at 561.

A waiver may be invalidated in the unusual circumstance where an error amounts to a miscarriage of justice. *Id.* at 561-62. Analyzing whether an appellate waiver should be set aside to avoid a potential miscarriage of justice, the court considers a number of factors. *Id.* at 563. Relevant factors include “the clarity of the error, its gravity, its character

(e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.” *Id.* (quoting *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001)). While noting that it “chose not to earmark specific situations,” the *Khattak* court stated that these factors are offered as “some guidelines,” and emphasized that the governing standard is one of a “miscarriage of justice.” *Id.* at 563.

Only where the petitioner claims that the waiver itself was the result of counsel’s ineffectiveness will courts decline to enforce an appellate waiver when a petitioner claims ineffective assistance of counsel in a 28 U.S.C. § 2255 motion. *United States v. White*, 307 F.3d 336, 337 (5th Cir. 2002); *United States v. Clark*, No. 05-2201, 2006 WL 1096157 at \*2 (3d Cir. Apr. 26, 2006). Thus, all other ineffectiveness contentions are precluded by the waiver.

To ensure that an appellate waiver is knowing and voluntary, the judge must inform the defendant of the plea agreement provisions waiving the right to appeal or collaterally attack a sentence, and determine that the defendant understands the waiver. *Khattak*, 273 F.3d at 560. In his motion, the defendant does not contend that he entered the plea agreement unknowingly or involuntarily, or that he did not understand the waiver. During his guilty plea colloquy, the defendant was specifically advised of his appellate rights and his right to collaterally attack his sentence by a habeas petition. He acknowledged he had these rights and that he was relinquishing them. Thus, the defendant’s appellate waiver was knowing and voluntary; and, absent a miscarriage of justice, it should be enforced.

Justice will not be compromised by enforcing the waiver. The evidence that would have been presented at trial was substantial. The defendant admitted his participation in the robberies. The defendant was sentenced to 175 months, consisting of 140 months on Counts One through Eleven and 35 months on Counts Thirteen through Eighteen, the latter to be served consecutively to the former. The sentence was five years below the bottom of the applicable range of 235-293 months, and significantly lower than the statutory maximum.

Because the waiver was knowing and voluntary, it will be enforced. The government did not appeal the sentence, the sentence was below the guidelines range and did not exceed the statutory maximum. The defendant has not offered nor do I find any circumstances that would result in a miscarriage of justice by enforcing the waiver. Therefore, the appellate waiver will be upheld.

### **Defendant's Claims are Frivolous**

Even if the appellate waiver were invalid, the defendant's claims fail on the merits. The sentence imposed was legal and counsel's performance was not deficient.

A court may impose concurrent or consecutive terms of imprisonment on a defendant for multiple offenses. 18 U.S.C. § 3584(a). Furthermore, the Sentencing Guidelines provide that "if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively . . . to the extent necessary to produce a combined sentence equal to the total punishment." U.S.S.G. § 5G1.2(d). In the application notes, it states that, "if no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total

punishment.” U.S.S.G. § 5G1.2 cmt. n.1. Thus, the defendant’s sentence, which included consecutive terms of imprisonment, was legal.

The defendant also argues that his counsel was ineffective because he failed to object to the consecutive sentences. The defendant cannot demonstrate that his attorney’s performance was deficient. The sentence imposed was legal and within the court’s discretion. There was no basis for counsel to object to the sentence. Hence, his performance was not deficient.

The defendant’s sentence was significantly less than what he could have received under the Sentencing Guidelines or the statutory maximums. Consequently, the defendant cannot establish any prejudice.

### **Conclusion**

The defendant’s appellate waiver was knowing and voluntary, and enforcing it will not work a miscarriage of justice. Even if the waiver were invalid, the defendant’s claims are meritless. Therefore, the defendant’s motion will be denied and the government’s motion will be granted.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	<b>:</b>	<b>CRIMINAL NO. 03-317-01</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	<b>CIVIL ACTION NO. 06-1265</b>
	<b>:</b>	
<b>JOSEPH DAVIS</b>	<b>:</b>	

**ORDER**

**AND NOW**, this 3rd day of October, 2006, upon consideration of the defendant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Document No. 98), the government's response to the motion, and the government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 (Document No. 101), it is **ORDERED** as follows:

1. The government's motion to dismiss the defendant's petition is **GRANTED**;
2. The defendant's Motion to Vacate, Set Aside or Correct Sentence Under § 2255 is **DISMISSED WITH PREJUDICE**;
3. The defendant having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

---

TIMOTHY J. SAVAGE, J.